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NO. 75-5394

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OCTOBER TERM, 1975

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IN THE

SUPREME COURT OF THE UNITED STATES

* * *

JERRY LANE JUREK,

Petitioner

V.

STATE OF TEXAS,

Respondent

* * *

On Petition For Writ of Certiorari To The
Court Of Criminal Appeals Of Texas

* * *

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL
Assistant Attorney General
Chief, Enforcement Division

BERT W. PLUYMEN
Assistant Attorney General

Attorneys for Respondent

P. O. Box 12548, Capitol Station
Austin, Texas 78711

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* * *

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES John L. Hill, the Attorney General of Texas, and files this Brief for Respondent in Opposition to the Petition for Writ of Certiorari in the above cause.

QUESTIONS PRESENTED

1. Do the Texas capital punishment statutes satisfy the requirements of Furman v. Georgia?
2. Were Petitioner's written confessions properly admitted into evidence?

STATEMENT OF FACTS

For the sole purpose of this Court's determination with respect to granting or denying certiorari, Respondent adopts the Statement contained in the Petition, except for the citation in part II A of this Brief in Opposition to additional facts in the transcript of Petitioner's trial.

ARGUMENT AND AUTHORITIES

I. THE TEXAS CAPITAL PUNISHMENT STATUTES SATISFY THE REQUIREMENTS OF FURMAN V. GEORGIA.

In his petition for writ of certiorari, Petitioner states:

> "The question presented here is whether the modifications wrought by the Texas legislature are substantial enough to meet the minimum requirement of Furman v. Georgia -- that the most extreme penalty known to contemporary man not be imposed arbitrarily." Id. at 21-22.

The modifications of which Petitioner speaks are the new capital punishment statutes enacted by the Texas legislature pursuant to this Court's decision in Branch v. Texas, 408 U.S. 238 (1972) sub nom. Furman v. Georgia. Respondent respectfully submits that these new capital punishment statutes do satisfy the requirement in Furman that the death penalty not be imposed arbitrarily.

The Furman opinion was rendered per curiam, with the five justices comprising the majority each filing a separate concurring opinion. Two of these justices, Mr. Justice Brennan and Mr. Justice Marshall, concluded that the death penalty is unconstitutional under any and all circumstances. The three other justices concurring in the majority invalidated the statutes under review because they permitted juries to impose the death penalty in an arbitrary, capricious and standardless fashion. These justices in effect condemned the uncontrolled discretion vested in juries to impose death or a lesser penalty.

Petitioner was tried, convicted and sentenced under the Texas statutes enacted to comply with Furman: Article 1257[1] of the Texas Penal Code and Article 37.071 of the Texas Code of

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1. "Article 1257 was superseded by Section 19.03 of the new Texas Penal Code, Acts 1973, 63d Leg., ch. 399, eff. January 1, 1974. Section 19.03 of the new Penal Code is substantially similar to Article 1257 of the old code." Jurek v. State, 522 S.W.2d 934, 936-37 n.1 (1975).

Criminal Procedure,

Article 1257, supra, states:

"(a) Except as provided in Subsection (b) of this Article, the punishment for murder shall be confinement in the penitentiary for life or for any term of years not less than two.

(b) The punishment for murder with malice aforethought shall be death or imprisonment for life if:

(1) the person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;

(2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;

(3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

(4) the person committed the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution.

(c) If the jury does not find beyond a reasonable doubt that the murder was committed under one of the circumstances or conditions enumerated in Subsection (b) of this Article, the defendant may be convicted of murder, with or without malice, under Subsection (a) of this Article or of any other lesser included offense.

(d) If one of the circumstances or conditions enumerated in Subsection (b) of this Article is charged in an indictment, the prospective jurors shall be informed that a sentence of either death or imprisonment for life is mandatory on conviction for the offense charged. No person is qualified to serve as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."

Article 37.071, supra, states:

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as praticable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection may not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against the sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue 'yes' unless it agrees unanimously; and

(2) it may not answer any issue 'no' unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an

additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals."

Respondent submits that these two statutes, at a minimum, effectively guard against the arbitrary capricious and standardless imposition of the death penalty.

> "First, Article 1257, supra, limits the circumstances under which the State may seek the death penalty to a small group of narrowly defined and particularly brutal offenses. This insures that the death penalty will only be imposed for the most serious crimes. It also insures that the death penalty will only be imposed for the same type of offenses which occur under the same types of circumstances.
>
> Article 37.071, supra, further limits the standardless imposition of the death penalty. It provides for a separate sentencing procedure to determine punishment, once the accused has been found guilty of a most serious crime. It limits the jury's discretion on the range of punishment to life imprisonment or death. A jury may no longer choose from a range of two years to life to death. Further, in order to impose the death penalty, the jury must find beyond a reasonable doubt and must respond affirmatively to two or three questions, depending on the circumstances. These questions direct and guide their deliberations. They channel the jury's consideration on punishment and effectively insure against the arbitrary and wanton imposition of the death penalty."
>
> Jurek v. State, supra, at 939.

For these and other reasons not delineated here, the Texas Court of Criminal Appeals correctly concluded that Article 1257 and 37.071 satisfied the test of Furman, though that Court was faced with all of the arguments presented in the instant Petition.

As a peripheral issue, Petitioner questions whether capital punishment per se is cruel and unusual punishment.

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> "Furman, . . . does not seem to ban the assessment of the death penalty per se or to eliminate all sentencing discretion. It seems reasonable to conclude that there are seven Justices - the four dissenters and . . . three members of the majority - who would permit the imposition of the death penalty, if the statutes under which it was imposed were properly drawn." Jurek v. State, supra at 937-38.

As delineated above, that Court, after careful deliberation, went on to conclude that the challenged Texas statutes satisfied the requirements of Furman.

In sum, Respondent submits that the decision of the Court below, in upholding the constitutionality of these statutes under Furman, was correct, and that this Court need not grant certiorari to review that judgment.

II. ADMISSION OF THE PETITIONER'S WRITTEN CONFESSIONS AT TRIAL, SATISFIED FEDERAL CONSTITUTIONAL REQUIREMENTS UNDER THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.

It is difficult to determine exactly what Petitioner is requesting this Court to review regarding the admission of his written confessions. Petitioner globally asserts that such admission "[w]as inconsistent with federal standards protecting rights secured by the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. (Petition at i and 50). However, Respondent will answer the identifiable contentions.

A. AFTER PETITIONER KNOWINGLY WAIVED HIS RIGHTS TO REMAIN SILENT AND HAVE BENEFIT OF COUNSEL, HE MADE TWO FREE AND VOLUNTARY CONFESSIONS.

Petitioner seems to assert that his low intelligence, lack of counsel, and the delay in arraignment "[r]aise the question whether his rights to remain silent and have benefit of counsel were intelligently and voluntarily waived." Petitioner's argument on this point consists largely of citation to legal

authority stating that the admission of confessions must be judged under the totality of the circumstances -- with which Respondent agrees -- and an implication that the Petitioner's confessions were in fact coerced -- a contention Respondent rejects as unsubstantiated and foreclosed by the findings of fact at trial and the evidence in the Record.

Petitioner cites several opinions by this Court for the proposition that a defendant's mental condition, lack of an attorney, detention without arraignment, and timing and frequency of interrogation are all factors relevant to the voluntariness of a confession. As a matter of law, Petitioner is correct. E.g., Clewis v. Texas, 386 U.S. 707 (1967); Fikes v. Alabama, 352 U.S. 191 (1957). However, the fact situations of the cases cited by Petitioner provide a ready contrast with the facts of the present case and, in fact, support the admissibility of Petitioner's confessions.[2]

With regard to Petitioner's mental capacity, the testimony at trial clearly shows that while Petitioner was of below average intelligence, he had adequate intellectual capacity to read and understand Miranda warnings and his confessions. (T. 1678, 1688, 1692-93, 1695-96, 1718-19). At trial, Petitioner completely failed to cast doubt upon his mental abilities. For example, his defense psychiatrist testified very specifically that Petitioner would understand the words set forth in the Magistrate's Warning Certificate regarding his rights to

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2. In Fikes v. Alabama, supra, the Court reversed the defendant's conviction because a confession was coerced. It considered among other factors the defendant's mental condition. The defendant in that case, a black man, started school at age eight and dropped out at age 16, still in the third grade. Three psychiatrists testified that he was a schizophrenic. Moreover, he was brought before a Magistrate five days after arrest. Gallegos v. Nebraska, 342 U.S. 55, 65 (1951), also cited by the petitioner, provides scant support for his position. In this case, the defendant, a Mexican farmhand who neither spoke nor read English, was held twenty-five days before arraignment. He was held in isolation interrupted only by frequent interrogations. In addition, his father and lawyer were barred from seeing him. Yet, the Court concluded that these circumstances did not render his confession involuntary.

counsel. (T. 1692-93). Witnesses to both confessions consistently testified that Petitioner appeared to understand everything and had no difficulty in expressing himself. (T. 56, 58, 63, 86, 122, 1302, 1425, 1474).

The uncontradicted testimony of the witnesses further establishes that Petitioner was alert and in full possession of his faculties at the time he made the confessions. (T. 120, 1331, 1385). The witnesses stated that Petitioner was not distraught, upset, disturbed or drowsy. (T. 1301, 1336, 1343). The evidence also shows Petitioner had the opportunity to sleep and was not deprived of food or drink. (T. 1339-42, 1761, 1766, 1770).

Petitioner was given Miranda warnings by the arresting officers, the county attorney, the district attorney and the Magistrate. (T. 68, 83-85, 125, 1290-93, 1301, 1316, 1338, 1378, 1763). The warnings were each explained several times in detail to Petitioner, (T. 68, 1433), who acknowledged that he understood them and made responses which clearly showed his understanding. (T. 56, 86, 1302, 1444). With the full understanding of his rights, Petitioner repeatedly asserted he did not want an attorney. (T. 55, 56, 59, 1380, 1390). The Record is replete with statements by witnesses to the confessions that Petitioner confessed freely and voluntarily, without coercion, threats or promises of any kind. (T. 68, 107, 126-29, 1365, 1402, 1405, 1425, 1437, 1440).

In summary, the record strongly supports the findings of the trial court that Petitioner's confessions and waivers of counsel were knowing and voluntary. It is also apparent that the facts of this case in no way approach the extreme circumstances of previous cases in which this Court has reversed for lack of voluntariness.[3]

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3. See, e.g., Gallegos v. Colorado, 370 U.S. 49 (1962); Spano v. New York, 360 U.S. 315 (1959); Fikes v. Alabama, supra; and Gallegos v. Nebraska, supra.

After conducting a hearing to consider Petitioner's Motion to Suppress the confessions, the trial judge entered written findings that both confessions were freely and voluntarily made with no coercion, mistreatment, threats or promises. (R. 21-2). See Jackson v. Denno, 378 U.S. 368 (1964). In accordance with Article 38.22 of the Texas Code of Criminal Procedure, the jury was nevertheless charged not to consider either confession for any purpose unless they found it was voluntarily made after Petitioner had intelligently and voluntarily waived his rights. (R. 63-4). Absent evidence which would render the confessions inadmissible as a matter of law, this Court should not reverse the findings of the trial judge and jury. Lisenba v. California, 314 U.S. 219 (1941). Here, the evidence is uncontroverted in favor of the findings of the trial court and the jury. Therefore, Petitioner's contentions concerning the inadmissibility of his confessions are entirely without merit.

B. PETITIONER'S CONFESSIONS WERE NOT THE PRODUCT OF AN UNLAWFUL ARREST.

Petitioner argues that his confessions are inadmissible because they were obtained while he was in custody pursuant to an unlawful arrest. However, Petitioner has not stated a single fact to show he was unlawfully arrested. Therefore, Petitioner's final contention is frivolous.

CONCLUSION

Petitioner was not convicted and sentenced in violation of the United States Constitution. The Texas Court of Criminal Appeals correctly held: that Article 1257 of the Texas Penal Code (now Section 19.03 of the new code) and Article 37.071 of the Texas Code of Criminal Procedure satisfy the requirements

of Furman v. Georgia; and that Petitioner's confessions were properly admitted into evidence.

PRAYER

WHEREFORE, Respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOE B. DIBRELL
Assistant Attorney General
Chief, Enforcement Division

BERT W. PLUYMEN
Assistant Attorney General

Attorneys for Respondent

P. O. Box 12548, Capitol Station
Austin, Texas 78711